NOS. 77-405 Cr. AND 77-417 Cr.

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-405 Cr.

GEORGE H. LUSTIG, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

NO. 77-417 Cr.

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vs.

UNITED STATES OF AMERICA, RESPONDENT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. JURISDICTION

No. 77-417 Cr., is a quasi-criminal case requesting review of a probation revocation and sentence.

II. QUESTIONS PRESENTED FOR REVIEW

NO. 77-405 Cr.

Respondent's Issue No. 4 incorrectly infers the "seal-a-meal" machine was discovered during an inventory

search of petitioner's vehicle, as opposed to a later warrantless search of an opaque parcel at police headquarters. (Tr. 765, 768) (App. D. Pet. No. 77-405 Cr., p. 27-28; App. E., Pet. No. 77-405 Cr., p. 45-61)

Respondent's Issue No. 7 incorrectly infers the juror excused ". . . said he possessed information that led him to believe petitioner was guilty." The trial judge simply made unsworn conclusions that the juror would be unfair to an unspecified defendant. (Tr. 321-330) (App. E, Pet. No. 77-405 Cr., p. 61-62).

NO. 77-417 Cr.

Respondent's Issue No. 8 ignores the distinction between increasing the severity of a sentence at a revocation by specifying consecutive time, and delaying the initiation of revocation proceedings until after service of an intervening sentence.

III. STATEMENT OF THE CASE[1]

NO. 77-405

The petitioner was convicted in Count V of possessing 317 milligrams of cocaine in violation of 21 U.S.C. 844(a), not 21 U.S.C. 841(a) (1). Count IV charged possession of 55 grams in violation of 21 U.S.C. 841 (a) (1). (R.888) (App. B, Pet. No. 77-405 Cr., p. 85-87).[2]

[1] Most of the critical portions of the transcript and record are set out in App. D and E to Petition No. 77-405 Cr., filed under separate cover September, 1977.

[2] This refutes respondent's contention that petitioner's admission of possession for personal use invokes the "concurrent sentence doctrine", and the "harmless error" rule.

Only Tarnef, who was protected from confrontation on bias, indicated Pederson used Lustig's last name. (Tr. 1514-1518, 1791, 1802, 1805). Lau never ". . . met with petitioner". (Resp. Op., p. 4).[3]

The truck being driven by petitioner did not contain 55 grams of cocaine in a "seal-a-meal" bag, or 217 milligrams of cocaine in a vial. Those were discovered when petitioner was in transport to Anchorage. (Tr. 774-783).[4]

Petitioner contended the truck was used by five other persons on his homestead, and the paraphernalia found therein belonged to one of them. (Tr. 1605-1671).

Callie Newton Lustig never testified that ". . . Pederson and petitioner had a verbal agreement to distribute cocaine." (Resp. Op., p. 6; Tr. 1951-1955, 1997).

[3] The officers observed Pederson meet a person resembling Mr. Lustig in a truck across an intersection from where Lau and Tarnef waited. Lt. Needham, second in command, and nearest the suspect meeting Pederson, testified he did not resemble petitioner. (Tr. 1419-1421, 1432). The "I.D.'s" of the other officers were made at a distance, under poor lighting conditions, through several windshields, and were tainted by a suggestive photo lineup with names attached to the photographs. (Tr. 272, 377, 1166, 1532, 1535). No one directly observed any distribution by Lustig, and Pederson testified Lustig was not involved. (Tr. 1575, 1891).

[4] Thus, the troopers making the arrest were bound by state law to release the vehicle to the petitioner's friends, negating an inventory search exception.

IV. ARGUMENT

NO. 77-405 Cr.

A. THE PETITIONER'S VALID COMMON LAW MARRIAGE WAS DESTROYED BY FAILURE TO RESPECT HIS MARITAL PRIVILEGE; HIS WIFE TESTIFIED TO MARITAL COMMUNICATIONS.

Respondent, and the Court of Appeals, assert the Newton-Lustig marriage was invalid under Alaska law, citing AS 25.05.011, 25.05.261, and 25.05.311, despite the fact that the marriage was valid under common law principles. (Tr. 1964; App. D, Pet. No. 77-405 Cr., p. 1). See *U.S. v. Lustig*, 555 F.2d 737, n. 11 (9th Cir., 1977). The Alaska Statutes referred to are essentially "property" statutes, limited by the Alaska Supreme Court on an equal protection analysis.[5]

Two children were born of the marriage, and a final decree has not yet been granted in Callie's civil suit, filed two days prior to trial, seeking dissolution of the marriage and assets and child custody; negotiations for a reconciliation are ongoing in the pretrial stages. (Tr. 1926, 1927, 1932, 1933, 1962-1965).

Callie testified as to marital communications relating to family finances imparted to her by Mr. Lustig while in the hospital, (Tr. 1950, 1955, 1961, 1967, 1969, 1970, 1971, 1994, 1996, 1997, 2004, 2014), and as to family dissension

[5] See concurring opion of Justice Erwin in *Burgess Construction Co. v. Lindley*, 504 P.2d 1023, 1026 (Alaska 1972). See also *Hager v. Hager*, 558 P.2d 919 (Alaska 1976) (AS 04.55.210 (6)) (statutory division of marital property as applied to common-law marriage), AS 11.35.010 (obligation of child support), AS 11.35.100 (both parents have parental rights to illegitimate children), AS 13.11.045 (inheritance through mother and father if acknowledged), AS 20.15.040 (consent of both parents for adoption).

over "drug dealing". (Tr. 1957, 1966). These communications occured prior to her leaving him. (Tr. 1965).

B. THE ERRONEOUS CONSPIRACY INSTRUCTION PREJUDICED THE PETITIONER AS TO ALL THE FELONY COUNTS OF THE INDICTMENT

While the "concurrent sentence" doctrine and the "harmless error rule" might have led the Court to deny certiorari for the co-defendant Pederson[6], the erroneous conspiracy instruction contributed to the conviction of Mr. Lustig on the two substantive counts of possession of cocaine with intent to distribute and distribution of cocaine in violation of 21 U.S.C. 841 (a) (1).[7]

[6] The "concurrent sentence" doctrine is of doubtful validity. See *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S. Ct. 2056 (1969), at 395 U.S. 791: "The concurrent sentence rule *may* have some continuing validity as a rule of judicial convenience." (E.A.). See also *U.S. v. Alexander*, 471 F.2d 923, 933, n. 17 (D.C. Cir. 1971), *cert. denied* 409 U.S. 1044 (1972), for the observation ". . . *the validity of the concurrent sentence doctrine is rapidly waning.*" (E.A.). Further, the concurrent sentence doctrine is merely a rule of discretion, and not a bar to review. See *U.S. v. Spear*, 449 F.2d 946, 948-949 (D.C. Cir. 1971). The recent decision in *U.S. v. Dunn*, F.2d , (Slip Op. 2674 at 2683) (C.A. 9th No. 76-2172; decided Nov. 11, 1977), indicates another panel has strongly criticized the "slight evidence" instruction due to its nullification of the concept of proof beyond a reasonable doubt, such that there is conflict within the Ninth Circuit, and this Court should exercise its discretion to clarify the issue.

> ". . .[C]onstrued to imply that participation in a criminal conspiracy may be proved by evidence that would be inadequate to prove the commission of some other criminal act, *the so-called slight evidence rule would vitiate the government's ever-present burden of proof. . . beyond a reasonable doubt*, the presumption of innocence, the rule that all doubts must be resolved, and equally plausible inferences drawn, in favor of the defendants and other traditional foundations of our nation's system of criminal justice. *U.S. v. Dun, supra* at 2683 (E.A.) (fn. omitted).

The jury was instructed in Instruction No. 20 that a conspirator is responsible for the acts of co-conspirators (R. 532), and was instructed orally that before determining whether statements of a co-conspirator could be used against the petitioner, they must determine that a conspiracy existed involving the petitioner. (Tr. 298).

The erroneous conspiracy charge "permeated all the verdicts" by allowing the jury to consider inadmissable statements and acts of purported co-conspirators on Mr. Lustig's intent in possessing 55 grams of cocaine in Count IV, and whether Mr. Lustig personally distributed cocaine to Mr. Pederson, or aided in said distribution, in Count I.[8]

[7] Pederson directly admitted the two counts of distribution. (Tr. 1821 - 1863). Any evidence of distribution by Lustig to Pederson was circumstantial and based on conflicting identifications. Pederson specifically denied the distribution was made by Lustig. (Tr. 1891).

While petitioner did admit possessing the cocaine discovered at the arrest, his defense was that the cocaine was for his personal use, so as to constitute a mere violation of 21 U.S.C. 844(a).

As to the "seal-a-meal" machine discovered in the truck at the arrest, and the phone calls to petitioner's residence, there was evidence that five other persons were using the truck and living on the petitioner's homestead. The petitioner testified that while one of said persons was dealing, he was merely a knowing spectator, and refused to participate in said activity, or enter any "conspiracy" due to fear of having his probation revoked. (Tr. 1591-1671). Thus, it is highly likely the jury found the conspiracy to exist between Pederson, his wife, Cheryl Rae Smith, a/k/a Sherri L. Pederson, and other persons, with the "slight evidence" instruction used to convict petitioner of conspiracy on less than proof beyond a reasonable doubt, and to impute to petitioner the damaging statements and acts of the co-conspirators as to the other substantive counts against him.

C. THE SEARCH OF THE OPAQUE PARCEL AT HEADQUARTERS VIOLATED THE FOURTH AMENDMENT; TIMELY AND SPECIFIC OBJECTIONS AND MOTIONS TO SUPPRESS WERE MADE.

The "seal-a-meal" bagging machine was not discovered until the parcel illegally seized from the petitioner's truck was searched later at police headquarters. (Tr. 767-769). Timely and specific motions to suppress and objections were made.[9]

[8] Respondent's contention there was "compelling evidence" of distribution by Lustig and "overwhelming" evidence of conspiracy, is false. Contrary to Respondent's statement that "four witnesses identified petitioner as the person who delivered the package of drugs to Lau", (Resp. Op., n. 6), there was no testimony that Lau and petitioner met directly. Thus, Pederson's purported use of Lustig's last name during the active phase of the conspiracy was a critical evidentiary issue effected by the erroneous conspiracy charge, as were the other purported statements by Pederson which tended to connect Lustig to the distribution. ("main man" in Wasilla, "owing $$ to main man", etc.). Unlike Pederson, there was no direct evidence of distribution by Lustig and no direct evidence of his intent to distribute. Callie Newton Lustig's testimony as to purported acts of distribution and/or conspiracy by the petitioner, went to acts and time periods not directly alleged in the Indictment.

[9] Respondent argues incorrectly at page 10 of its brief that "Because petitioner did not make these arguments in the district court, he is precluded by Fed. R. Crim. P. 12(f) from making them now. . .". In fact, motions and requests for evidentiary hearings were made on the grounds that the searches of the petitioner's truck and the contents were not justified as valid inventory or automobile searchs, or searchs incident to arrest under federal and state law. (App. E, Pet. No. 77-405 Cr., p. 45-52; R. 43, 210, 212, 218, 263). During trial objections and written suppression motions, and offers of proof were also made on the grounds now urged by Petitioner (App. E, Pet. No. 77-405 Cr., p. 27, 53, 59; R. 371, 383-412; Tr. 743-753, 765). See Fed. R. Evid. 103 (a) (1).

Respondent's argument disregards the fact that under *U.S. v. Chadwick*, 97 S.Ct. 2476 (1977), *South Dakota v. Opperman*, 428 U.S. 364 (1976), and the holding of the Court of Appeals herein, it is essential any "inventory search" be valid and/or mandatory under Alaska law.[10]

Since the truck should have been released, there was no necessity for an inventory search and the warrantless seizure of the opaque parcel and ensuing search at police headquarters was unjustified under either *South Dakota v. Opperman, supra,* or *U.S. v. Chadwick, supra.*

[10] Since the officers making the arrest, searches and seizures were Alaska Troopers, Alaska law governs. *Elkins v. U.S.*, 364 U.S. 206, 80 S.Ct. 1437 (1960). *Zehrung v. Alaska*, 569 P.2d 189 (Alaska 1977), is relevant since the case indicates the Alaska Supreme Court has adopted the "necessity" doctrine as to an inventory search of a persons body with the implication that the "necessity" doctrine will be applied to automobiles. See also *State v. Goodrich*, 21 Cr.L. Rptr. 1977 (Minn. 7/15/77) (necessity standard for automobile inventory search). Respondent's contention the truck could not be released to petitioner's friends as mandated under 13 AAC 2.350, 13 AAC 2.375, and *Zehrung, supra,* because "subject to forfeiture", misconstrues the facts, since any cocaine discovered was found on the person of the petitioner during transport, after the invalid seizure of the truck had occured. Note further, Alaska has no forfeiture provisions for vehicles used to transport controlled substances, and see *U.S. v. Rickman*, 523 F.2d 323, 328 (9th Cir. 1975) and *U.S. v. McCormick*, 502 F.2d 281 (9th Cir. 1974) as to the necessity of exigent circumstances and probable case for a warrantless "forfeiture seizure".

D. THE ARBITRARY DENIAL OF THE RIGHT TO BE PRESENT, OR A RECORD, AT THE COMMUNICATION WITH AND EXCUSAL OF A JUROR, PREJUDICED THE PETITIONER'S RIGHT TO A JURY TRIAL, AND WAS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Respondent incorrectly argues the excused juror stated he ". . . possessed information that made him believe the petitioner was guilty. . .". (Resp. Op., p. 13).[11]

The court's action did not ". . . [conform] to procedures sanctioned by other courts of appeal. . ." (Resp. Op., p. 13), in that no cases have affirmed such action in the absence of an emergency. Thus, there was prejudice to petitioner's right to a particular jury and prejudice by seating the alternate, who was not approved by the petitioner. (Tr. 130; Petitioner Lustig's Reply Brief in C.A. 9th No. 76-2661 at p. 4-6).

[11] This assumption was one made by the Ninth Circuit, and apparently adopted by the government. It was apparently based on unsworn conclusions made by the trial judge. (Tr. 321-330). The Petitioner consistently requested a sworn record to make an independent assessment of any purported prejudice, so as to argue for the right to be tried by a particular juror. cf. *U.S. v. Jorn*, 91 S.Ct. 547 (1971); *Wade v. Hunter*, 363 U.S. 684, (As to ". . . defendant's valued right to have his trial completed by a particular tribunal. . ."). See also. *U.S. v. Dinitz*, 96 S.Ct. 1075 (1976), as to the prohibition against terminating a defendant's right to trial before a particular jury.

> "Even when judicial or prosecutorial error prejudices the defendant's prospect for securing an acquittal, *he may, nonetheless, desire 'to go the first jury, and, perhaps, end the dispute then and there with an acquittal.' " Dinitz, supra,* at 96 S.Ct. 1080 (E.A.).

E. THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL OF CHOICE THROUGH NO FAULT OF HIS OWN

Respondent ignores the prejudice to Mr. Lustig's right to counsel, to call witnesses. to cross-examine and confront accusers, and to prepare a defense, occasioned by the notoriety of the case, arbitrary freezing of his assets, the substandard conditions in which he was held, and the arbitrary refusal to grant a reasonable continuance, despite his inability to obtain counsel of choice until four days prior to trial. (See App. D, Pet. No. 77-405 Cr., p. 1-26; App. E, Pet. No. 77-405 Cr., p. 39-44).

F. THE RESENTENCING OF PETITIONER TO CONSECUTIVE TIME AT A PROBATION REVOCATION VIOLATED DOUBLE JEOPARDY

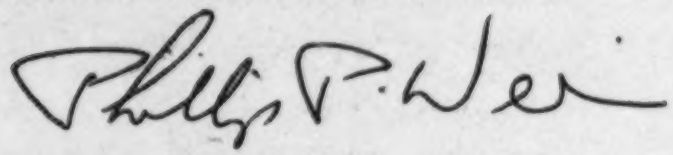
Respondent incorrectly cites *Zerbst v. Kidwell,* 304 U.S. 359 (1938), *Moody v. Daggett,* 429 U.S. 78, 85 (1976), and *U.S. v. Bartholdi,* 453 F.2d 1225, 1226 (9th Cir. 1972), which indicate service of a parole warrant may be delayed until completion of an intervening sentence, not that parole may be revoked with the specification of a consecutive sentence.[12]

Since here the petition to revoke probation was served, a revocation hearing was held, and probation was revoked, the re-sentencing of Mr. Lustig to consecutive service of the original sentence violated the double jeopardy clause, 18 U.S.C. 3651, 18 U.S.C. 3653, and 18 U.S.C. 3658.[13]

V. CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,



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[12] In *U. S. v. Tacoma,* 199 F.2d 488, 482 (2nd Cir. 1952), there was a contemperaneous sentencing for an intervening offense and a probation revocation; since the aggregate result was clearly within the jurisdiction of the sentencing judge, the court affirmed.

[13] The reference to 18 U.S.C. 3658, demonstrates the validity of petitioner's argument that once a warrant on a petition to revoke probation is served, a probationer cannot be "resentenced" to consecutive time to an intervening conviction, and yet still be held pending an appeal from said conviction, on the probation revocation judgment. This specific argument was made in oral argument before the Ninth Circuit and in the Petition for Rehearing En Banc.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 24(4), Rule 33 (1), Rule 33 (2) (a), and Rule 33 (3) (b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Reply Brief of Petitioner in Support of Petitions For Writs of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, the Solicitor General of the United States, and counsel for both co-defendants below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

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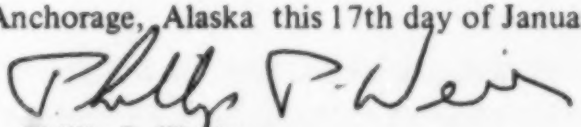

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